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Private Insurance as a Solution to the Driver-Guest Dilemm

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COMMENTS

PRIVATE INSURANCE AS A SOLUTION TO THE DRIVER-GUEST DILEMMA

The duty of the driver of an automobile to his nonpaying passenger, and liability arising from the breach of that duty, has long presented a troublesome area of litigation for the courts and the parties involved. Application of standards unsuited for the peculiar risks of automotive transportation has produced inadequate compensation in some cases and excessive recoveries in others. Meanwhile, trial calendars are overcrowded with personal injury litigation, and insurance companies must bear the awards of sympathetic juries and those resulting from collusion between passenger and driver. The over-all expense of this method of determination of liability, far too little of which actually goes to compensate the injured plaintiff, is passed on to the public in the form of higher insurance premiums. It is the purpose of this comment to review the approaches heretofore used in defining the driver's duty, and to offer a solution which, by eliminating the inherent difficulties in these approaches, might afford a fairer and more workable means of compensating the injured guest.

I. The Nature of the Existing Problem

Four different approaches have been used in defining the driver's duty to a nonpaying passenger. Some courts have employed an analogy to the gratuitous bailment of chattels, and have held the driver to the bailee's duty of refraining from "gross negligence."[1] Analogy to the duties of an owner of real estate has also been applied,[2] principally involving the distinction between a person who is invited by the owner to enter his premises, and one whose request to enter is granted by the owner. Applying this distinction to the invited passenger and one who has requested a ride, the courts have allowed the former to recover for the driver's ordinary negligence, while the latter is treated as a mere licensee or trespasser and must prove wanton or willful conduct by the driver in order to recover.[3] Pursuing this analogy to the landowner's duties, a standard of ordinary negligence is applied to affirmative acts of the driver,[4] and he must inform the guest of any defects in the

1 *E.g.*, Slaton v. Hall, 172 Ga. 675, 158 S.E. 747 (1931); Passler v. Mowbray, 318 Mass. 231, 61 N.E.2d 120 (1945); Rose v. Squires, 101 N.J.L. 438, 128 Atl. 438 (1925); see Prosser, Torts § 77 (2d ed. 1955).

2 See, *e.g.*, Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961); MacKenzie v. Oakley, 94 N.J.L. 66, 108 Atl. 771 (1920); Lutvin v. Dopkus, 94 N.J.L. 64, 108 Atl. 862 (1920).

3 Lutvin v. Dopkus, *supra* note 2; Kraus v. Fisher, 9 N.J. Misc. 1053, 156 Atl. 315 (Sup. Ct. 1931); Gruda v. Karbowski, 6 N.J. Misc. 49, 139 Atl. 893 (Sup. Ct. 1928). New Jersey appears to be the only state to have made this distinction. It finally decided to switch to an ordinary care approach in Cohen v. Kaminetsky, *supra* note 2.

4 Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 Pac. 629 (1928); Dickerson v. Connecticut Co., 98 Conn. 87, 118 Atl. 518 (1922); Lorance v. Smith, 173 La. 883, 138 So. 871

automobile of which he is aware.[5] However, unknown defects in the automobile,[6] as well as incompetence[7] or active misconduct[8] of the driver which are known or obvious to him, are risks which the guest must assume. A third approach has been the establishment of a general standard of ordinary negligence in all driver-guest situations, disregarding the nice distinctions of bailment and real estate doctrines.[9] In a majority of cases decided under the foregoing common-law principles the injured guests were successful.[10] More often than not, active negligence on the driver's part was found, rather than a concealed defect which might have vindicated the driver under the owner-of-real-estate analogy. The fourth approach is embodied in the so-called "guest statutes," now in force in about half the states. Such statutes distinguish between the paying and nonpaying passenger, imposing liability for ordinary negligence in the former case, yet only for intentional, "willful," or "wanton" conduct—essentially a gross negligence standard—in the latter case.[11]

All of the foregoing attempts to define the driver's duty have inherent deficiencies. The rationale of the gratuitous bailment cases is objectionable in that the law should have a higher regard for the safety of human life than it does for the safety of property in gratuitous undertakings.[12] Certainly the slight duty of care owed by a gratuitous bailee of chattels is an entirely inadequate safeguard where human life is concerned. Moreover, the standard of "gross negligence" upon which liability is determined is difficult to define and administer.[13] Although the rule was designed for the situation where

(1932); Dashiell v. Moore, 177 Md. 657, 11 A.2d 640 (1940); Rudolph v. Ketter, 233 Wis. 329, 289 N.W. 674 (1940).

5 *In re* O'Byrne's Estate, 133 Neb. 750, 277 N.W. 74 (1938); Waters v. Markham, 204 Wis. 332, 235 N.W. 797 (1931); *cf.* Eastman v. Silva, 156 Wash. 613, 287 Pac. 656 (1930).

6 See, *e.g.*, Sloan v. Gulf Ref. Co., 139 So. 26 (La. App. 1924) (lights); Clise v. Prunty, 108 W. Va. 635, 152 S.E. 201 (1930) (chains and brakes); Harding v. Jesse, 189 Wis. 652, 207 N.W. 706 (1926) (brakes). See also Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930); Marple v. Haddad, 103 W. Va. 508, 138 S.E. 113 (1927); Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938).

7 See, *e.g.*, Powell v. Berry, 145 Ga. 696, 89 S.E. 753 (1916) (intoxication); Krueger v. Krueger, 197 Wis. 588, 222 N.W. 784 (1929) (sleepiness); Clearly v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926) (inexperience).

8 See, *e.g.*, Curry v. Riggles, 302 Pa. 156, 153 Atl. 325 (1931) (improper driving); Leonard v. Bartle, 48 R.I. 101, 135 Atl. 853 (1927) (overcrowding); Brockhaus v. Neuman, 201 Wis. 57, 228 N.W. 477 (1930) (speed).

9 See, *e.g.*, Sheean v. Foster, 80 Cal. App. 56, 251 Pac. 235 (1926); Jacobs v. Jacobs, 141 La. 271, 74 So. 992 (1917); HUDDY, AUTOMOBILES 118 (2d ed. 1909).

10 See Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961).

11 The statutes are collected and classified in Comment, 3 WYO. L.J. 225 (1949); Comment, 1 WYO. L.J. 182 (1947).

12 See Munson v. Rupker, 148 N.E. 169, 174 (Ind. App. 1925). This case presented a rather complete review of the approaches used in defining the driver's duty to his guest. It criticized all the approaches except that of reasonable care, stating that the latter is the only sensible rule. See also 18 VA. L. REV. 342 (1932).

13 See Steamboat New World v. King, 57 U.S. (16 How.) 469, 473 (1853). This case discussed the attempts to fix degrees of negligence, and pointed out the disapprobation of the judiciary for such attempts because of the impracticability of applying degrees of negligence to specific fact situations.

the relationship of driver and passenger exists only for the benefit of the passenger, the courts apply the standard indiscriminately to all nonpaying passengers, even though not all nonpaying passengers have the same status. In many cases the relationship may be for the mutual benefit of the parties,[14] or even for the sole benefit of the driver.[15] There is no reason to apply a lower standard of care in such cases just because the driver received no financial reward.

Much of the same criticism can be directed at the licensee-invitee analogy. There is an inherent difficulty in deciding whether a passenger is a licensee or invitee according to the niceties and subtleties of such definitions.[16] Also, the risks of a guest upon real property bear little resemblance to those faced by the gratuitous passenger in an automobile. Land is an inactive thing, and a licensee going onto real estate may assume that the owner will not put in force motion that may injure him. But the driver of a car does create a danger by putting a force in motion, and because of the sacredness of life and limb, the law should demand that he control it with care proportionate to the danger created. The standard of ordinary care involved in the third approach has also been criticized. In many instances it seems unjust to allow an ungrateful passenger, having accepted a free ride, to impose liability upon the driver as a result of an ordinary traffic mishap.[17] A more serious problem is that of collusion. The increased use of liability insurance by drivers, made necessary by the growing frequency and severity of automobile accidents, has tended to lessen the reluctance of injured passengers to sue their drivers. The real defendant in driver-guest litigation is generally an insurance company, and ordinary negligence is not hard to prove if the passenger and the driver cooperate to that end. Since in many cases gratuitous passengers are relatives or friends, the personal injury actions have become a source of collusion and fraud against the insurance company.[18] Not only are the insurance companies hurt by the collusive verdicts obtained by the injured passenger, but so is the driving public, since every adverse verdict tends to increase the premiums paid by automobile drivers.

The enactment in many states of automobile guest statutes, which make proof of willful or wanton conduct by the driver necessary for recovery by a guest, has been to a large extent responsive to the problem of collusion. Although the guest statutes cure the difficulties of the ordinary care approach—ingratitude and collusive litigation—it is questionable whether these advan-

14 See, *e.g.*, O'Brien v. Woldson, 149 Wash. 192, 270 Pac. 304 (1928).

15 See, *e.g.*, Gaboury v. Tisdell, 261 Mass. 147, 158 N.E. 348 (1927); Lyttle v. Monto, 248 Mass. 340, 142 N.E. 795 (1924); Flynn v. Lewis, 231 Mass. 550, 121 N.E. 493 (1919); Rook v. Schultz, 100 Ore. 482, 198 Pac. 234 (1921).

16 See, *e.g.*, Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961).

17 See, *e.g.*, Galloway v. Perkins, 198 Ala. 658, 73 So. 956, 957 (1917); Mitchell v. Raymond, 181 Wis. 591, 195 N.W. 855, 868 (1923).

18 See Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931). The court pointed out that the fear of collusion constituted a reasonable basis for legislative classification, and that therefore plaintiff's objection that the statute violated the equal protection clause of the fourteenth amendment was without merit.

tages compenste for the host of problems such legislation presents. Perhaps the major problem is one of definition. Disagreement has marked judicial attempts to define "willful and wanton," even within the same jurisdiction.[19] Definitional problems are also involved with "guest"; apparently the same indiscriminate standard is applied to all nonpaying passengers[20] regardless of non-monetary benefits conferred on the driver. This factor has led some writers to advocate a stricter definition of "guest."[21]

Just as in the cases of the first two approaches above, it can be argued that the slight duty of care required of the driver by the statutes is an inadequate safeguard where human life and safety are at stake. The charge of perjury and collusion between the driver and passenger should furnish no sound reason for altering the substantive duty of the driver. Nor should fear of rising insurance rates provide cause for limiting the driver's duty beyond a degree consistent with the dangers of automobile transportation. And it may be of socio-economic benefit for the loss to injured passengers to be shared by the car-owning public rather than be borne by the injured alone.

II. A PROPOSED SOLUTION

The problems apparent in the four approaches described would best be remedied by removal of the most troublesome issue—fault. Through use of the insurance plan which will be discussed, drivers as well as guests could be spared the trouble and expense of litigation, and yet the injured party would receive reasonable compensation. Rather than attempt a compulsory insurance program, however, the injured guest would retain the alternative of suing under the ordinary care approach where the driver has chosen not to carry guest insurance. Upon this framework, the following legislative scheme is proposed:

(1) The injured passenger will have his common-law, ordinary care remedy[22] if the driver does not utilize private insurance to provide compensation for the passenger's injuries.

(2) If, however, the driver carries a liability policy with a "passenger protection rider," the injured passenger's sole remedy is a direct action against the insurer to recover the amount prescribed under such rider.

19 See Cope v. Davison, 30 Cal. 2d 193, 180 P.2d 873 (1947). In California, broad interpretation of "gross negligence" has caused the virtual elimination of this concept from legislation. See CAL. VEHICLE CODE § 17158.

20 For example, since the statutes do not expressly exclude infants from coverage, it is conceivable that the undesirable result of an infant being considered a "guest" and allowed to recover only for willful and wanton conduct could occur.

21 2 HARPER & JAMES, TORTS § 16.15 (1956).

22 From the foregoing criticisms of the guest statutes, it may be forcibly argued that, aside from the problems of collusion and excessive litigation, the ordinary care approach is a sound and salutary way to define the driver's duty. Even the problem of collusion may have been somewhat mitigated by the current practice of preferred premium rates for safe drivers—those who have not been involved in accidents for a certain length of time.

(3) The sum to be recovered by the passenger will be reasonable medical expenses in minimum amounts set by statute.

(4) The injured passenger can recover from the insurer without regard to the question of fault of the parties, so long as he is covered under the passenger protection rider.

(5) The legislative scheme is not compulsory, although it contains a great inducement to the automobile driver to purchase the policy, so that he may avoid the risk of excessive personal liability which might result from a case litigated under the ordinary care standard.

(6) The insurance is private and therefore unencumbered by administrative assessment and state control.

The main emphasis of the legislative scheme, therefore, is to allow private insurance to solve the problem by contract, thus freeing the courts from the burden of interpreting such vague terms as "willful," "wanton," "gross negligence," and other phraseology which has traditionally been employed in a vain attempt to define fairly the driver's duty to his passenger. The payment of reasonable medical expenses under the passenger protection rider merely extends the "first aid" clause now written into automobile liability insurance. These features will solve most of the problems of the driver-guest situation by providing a reasonable measure of compensation to an injured victim, while reducing tort litigation and its attendant evils. Today personal injury actions constitute a great portion of all lawsuits, with the result of serious impairment of the effectiveness of the law because of the clogging of court dockets.[23] This delay frequently results in a distortion of the facts, since witnesses are forced to reconstruct events which occurred years earlier.[24] The proposed legislation, by reducing the quantity of litigation, would increase confidence in the legal process. Even if the injured party, after the delay and expense of a number of years of litigation, wins the suit and is awarded a judgment, he has only a slim chance to realize his award if the defendant does not carry automobile insurance.[25] This uncertainty, expense, and delay which now deter many victims from prosecuting just claims would be eliminated by the legislation. Since the suggested scheme of insurance is a voluntary, private plan,[26] unencumbered by administrative assessment and

23 Life, Nov. 10, 1952, p. 127.

24 Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INSURANCE COUNSEL Q. 62 (1953).

25 A computation by the New York Insurance Department in 1950 disclosed that in New York alone the ascertained uninsured bodily injury was well over $10,000,000. N.Y. STATE INS. DEP'T REP., THE PROBLEM OF THE UNINSURED MOTORIST 11, 12 (1951). If the defendant does not carry liability insurance, the injured has only a 25% chance to obtain compensation. See REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 86 (Columbia University Council for Research in the Social Sciences 1932).

26 When Massachusetts in 1925 introduced a system of compulsory liability insurance, many critics stated that political complications and increased state regulation of private insurance are necessary or at least probable concomitants of compulsory insurance. See, *e.g.*, McVay, *The Case Against Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 150 (1954).

state control,[27] it differs significantly from plans based on the workmen's compensation rationale, which have been rejected in some states.

This legislation, which could remedy to a large extent the problems of driver liability without resort to objectionable compulsory insurance plans, might be drafted as follows:

"Sec. 1. In any action by a passenger (as defined in section 1(a) *infra*) or, in case of death of such passenger, by his dependents against the owner or operator of a motor vehicle for unintentional injury to person or property while a passenger in such motor vehicle, the owner or operator shall be held to a duty of ordinary care; and damages, if any, shall be measured according to common-law negligence principles, except that if the owner or operator has an automobile liability insurance contract with a valid passenger protection rider (as defined in section 1(b) *infra*), the passenger's sole and exclusive remedy shall be a direct action against the insurer for the amount prescribed under such rider. If, however, this direct action eventuates in a finding that the passenger is not covered by the passenger protection rider, the passenger may then pursue a common-law action against the owner or operator.

"(a) For purposes of this statute, a passenger shall include all individuals riding in a motor vehicle with the knowledge or consent of the owner or operator, except:

1. The operator of such motor vehicle,
2. Those individuals riding in a common carrier,
3. Those individuals who have an express contract of transportation with the operator, employer of the operator, or owner of the motor vehicle, and
4. Employees of the owner or operator, if covered by a workmen's compensation statute.

"(b) A passenger protection rider is a provision in a contract of liability insurance for payment to a passenger as defined above without reference to the fault of the driver of all reasonable medical expenses in minimum amounts set by statute up to a maximum of $———— and disability allowances according to the following schedule . . . .

"Sec. 2. The statute of limitations for the common-law action shall be tolled during the period the direct action against the insurer is pending.

"Sec. 3. If a passenger (or his dependents), entitled to compensation under the passenger protection rider, is injured or killed by the sole negligence or wrong of another, not the owner or operator of the vehicle in which the passenger was injured, or by the joint negligence or wrong of such other and the owner or operator of the vehicle in which the passenger was injured, such injured passenger (or his dependents) need not elect whether to take compensation under the rider or to pursue a common-law remedy against such other, but may take such compensation and at any time prior thereto or within six months after the awarding of compensation pursue his remedy against such other. If such injured

[27] Since minimum coverages will be prescribed by statute, only a minimum amount of state control of underwriting practices would be necessary.

passenger (or his dependents) takes or intends to take compensation under the passenger protection rider and desires to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case the insurer liable for the payment of such compensation shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including reasonable attorney's fees incurred in effecting such recovery, to the extent of the total amount awarded under the passenger protection rider.

"Sec. 4. If such injured passenger (or his dependents) has taken compensation under the passenger protection rider, but has failed to commence action against such other within the time limited therefor, such failure shall operate as an assignment of the cause of action against such other to the insurer. If the insurer recovers from such other, either by judgment, settlement, or otherwise, a sum in excess of the total amount of compensation awarded to such injured passenger (or his dependents) together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured passenger (or his dependents) any such excess.

"Sec. 5. If such injured passenger (or his dependents) proceed against such other, the insurer shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided for by the passenger protection rider."

Discussion of the proposed legislation involves two important inquiries. First, does the legislation solve the problems inherent in the approaches heretofore used? Second, does the legislation itself present problems such as workability or constitutionality?

The problems of the analogy approaches stem principally from the difficulty of definition of such concepts as "gross negligence," "licensee" and "invitee" and the dissimilarity between the factual settings of these analogues and the driver-guest situation. This leads to the application of an inadequate standard of care in the situation in which human life is jeopardized by the dangerous force of the automobile. The suggested legislation contains no definitional pitfalls. The provisions of the policy will attach if a "passenger," as explicitly and comprehensively defined in the statute, is injured unintentionally. In response to another criticism of the analogies—that the standard of care is so slight that human life is not satisfactorily safeguarded—the legislation should result in economically induced carefulness on the part of the driver. If the insurer must pay under the policy even in the case of faultlessness on the part of the driver, and if passenger protection premiums will be dependent upon the risk experience of the insured drivers, the probability of increased premiums will induce the driver to be especially careful to avoid any accident.

A major problem involved in the ordinary care approach—collusion—would be greatly reduced, because the statutory limitation upon the amount of recovery would virtually remove the incentive, and the elimination of the fault issue would largely eliminate the occasion for the collusion. It may be contended, however, that the danger of collusion would not be eliminated, since a driver is not compelled to buy a passenger protection rider, and he could simply rely upon ordinary automobile liability insurance to shift the burden of his common-law liability to an insurance company. Such a choice by the driver would produce the very situation found in jurisdictions which espouse the ordinary care approach. This continuance of the problem could be avoided if insurance companies either refuse to write automobile insurance contracts without the passenger protection rider, or charge such high premiums on policies lacking the rider that drivers economically are forced to purchase the rider. It might also be argued that, as juries become familiar with the passenger protection rider and realize that driver-guest litigation over common-law negligence arises only where the driver has failed to purchase this protection, they will become more liberal than ever in awarding verdicts to injured passengers. This might cause insurance coverage without the rider to become even more costly.

A further problem involved in the ordinary care approach—court clogging—would also be greatly reduced by the statutory scheme. Although the passenger's sole remedy, assuming the driver has a protection rider, does involve a court action against the insurer, the only disputable issues to be determined will be coverage, injury, causation, and amount of damages. The most troublesome issue—negligence—will, of course, not be litigated. And of the four disputable issues left in such cases, only the amount of damages would be hotly contested in the average action.

Although the courts would be only minimally involved in such a scheme, and there would thus be substantial conservation of judicial energy, some may still advocate abandonment of jury trial in guest cases, with determination to be entrusted to administrative boards.[28] The administrative tribunal, it is argued, would be much less expensive and time-consuming than jury trial. However, in an excellent study, accompanied by statistical data, comparing the relative expense of federal employers' liability and workmen's compensation, it was ascertained that the employers' liability system, involving jury trials, insofar as disputable issues are concerned, costs less per dollar of benefits obtained.[29] The added expense of administrative determination, both in the establishment and operation of such a board, indicates that direct court action against the insurer is the more feasible approach.[30]

28 See, *e.g.*, Pillsbury. *Administrative Tribunals*, 36 HARV. L. REV. 405, 423 (1922). *But see* DAVIS, ADMINISTRATIVE LAW 16 (1951).

29 See Conard, *Workmen's Compensation: Is it More Efficient Than Employer's Liability*? 38 A.B.A.J. 1011, 1058 (1952).

30 Administrative determination of guest cases would not, of course, be objectionable if a state decided to handle all personal injury suits in the setting of an administrative board.

The guest statute's deficiency of inadequate safeguard of human life, because of the slight duty of care required, as well as the serious problems of definition involved, would be eliminated by the proposed private insurance scheme. The proposed legislation allows the problem of excessive recoveries occasioned by jury sympathy or collusion to be solved by the private insurer through contract, rather than by a court which is forced to make tenuous distinctions in interpreting language of conduct, such as "willful" and "wanton."

III. PROBLEMS UNDER THE PROPOSED LEGISLATION

Assuming that the proposed legislation obviates the major problems inherent in the existing approaches to driver-guest litigation, it might be asked whether it will introduce its own peculiar problems, not present in the existing schemes. It is conceivable, for instance, that constitutional arguments might be raised against the proposed legislation. Although the plan is literally voluntary, the potentially high cost of driving without the passenger protection rider will virtually compel all drivers to adhere to the legislative scheme. However, a state's power to establish and regulate its highways would appear to justify enactment of such a protective measure. Support for this proposition is found in the Supreme Court's refusal to strike down the Massachusetts compulsory insurance scheme involved in *Ex parte Poresky*.[31] It might also be argued that the elimination of the common-law negligence action of the passenger against an owner or operator having an insurance policy with a passenger protection rider is unconstitutional in that it takes his property without due process of law. However, the workmen's compensation laws, as well as the guest statutes themselves,[32] have been found constitutional, and therefore this argument would appear to be met. More debatable is the problem of discrimination, as passengers of drivers who have no contract of insurance with a passenger protection rider will be treated differently from those whose drivers carry such insurance, and the passenger, although he is the party most affected by such classification, will have no prior control over his mode of treatment. It appears, however, that, even if this objection is pressed, the courts should have no difficulty in upholding the reasonableness of the classification.[33]

Another extremely important consideration is whether the suggested insurance scheme will sell. Naturally, this will depend to a great extent upon how the legislation will affect insurance rates, *i.e.*, to what extent will the cost of insurance increase? A significant factor which deserves repeated

31 290 U.S. 30 (1933). A Massachusetts resident claimed he could not afford to comply with the statute, yet wished to drive a car on the state's highways. The district court dismissed for lack of a federal question, and the Supreme Court affirmed in a brief per curiam decision.

32 See Silver v. Silver, 280 U.S. 117 (1929).

33 The Supreme Court has indicated a readiness to sustain legislative classifications not based on race or alienage. See, *e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

emphasis is that the driver would be under a great inducement to buy such a policy, if the rates are at all reasonable. The likelihood of an automobile accident occurring today is greater than ever, and juries in negligence suits have shown increased willingness to award liberal compensation to injured claimants. An insurer, recognizing the danger of collusion, will either not allow the loss to be shifted to it, or in doing so will charge a sufficient premium to absorb such losses. With regard to the impact of the legislation on the fixing by the insurer of reasonable premium rates, the limit on the total amount of recovery should provide a working basis for actuarial rates. Although only a thorough actuarial analysis could lead to a final conclusion, a number of factors reducing costs of the insurer indicate fairly low rates could be charged, probably even lower than a liability insurance contract without the passenger protection rider. First, the reduction in litigation will substantially reduce the insurer's costs of defending or settling such actions, an expense which previously would have been passed on to policy holders in the form of higher premiums. Second, the limitations on recovery under this legislation could very well result in an over-all decrease in the insurer's outlay for accident claims. Although more claims would be presented, they would not be padded by a sympathetic jury's inclination to award excessive damages, often taking into consideration the high percentage of the award which will be paid the plaintiff's lawyer, who usually is operating on a contingent fee basis. Thus it is possible that an insurer will issue a policy with a passenger protection rider at a rate lower than a liability insurance policy without such a rider. This, of course, will depend upon the extent to which liability without reference to fault will increase the number of compensable claims. These factors have induced one company, Nationwide Mutual Insurance Company, to offer a so-called family compensation endorsement.[84] The endorsement, created in 1957, has obtained approval in a number of states.[85] The main thrust of the scheme is an absolute liability option, whereby an insured may, for an extra premium comparable to that for the medical payments protection,[86] add this family compensation endorsement to his liability policy. If he is involved in an accident with his car, the injured party has a choice of pursuing his claim under ordinary negligence law *or* of accepting immediate payment under the option without regard to whether the insured was at fault or would be liable at law. Payment is made according to a schedule, but covers death benefits, indemnity, and medical expense.[87]

[84] See, Averbach, *A NACCA Lawyer's Views on the Casualty Insurance Industry*, 1958 INS. L.J. 27, 32-33.

[85] As of 1958, Connecticut, Delaware, Maryland, Rhode Island, Vermont, Indiana, Michigan, New York, Ohio, Pennsylvania and South Carolina had approved the endorsement. *Ibid.*

[86] The insured has an option of obtaining the endorsement along with the company's auto liability policy; the endorsement costs slightly more than the present medical payment part of the standard policy.

[87] According to casualty actuary Robert Griffith, the endorsement will go a long way

The giving of an option to the injured party to accept immediate payment under the endorsement indicates a strong desire on the part of the insurance company to increase the settlement of claims without litigation. This apparent distaste of insurance companies for extensive litigation under common-law or statutory standards of negligence would seem to indicate their willingness to consider a plan such as that proposed herein. The proposed plan should appear even more attractive to insurers than Nationwide's family compensation endorsement, since the injured passenger would have no option to seek damages through trial before a jury.

IV. CONCLUSION

Present approaches to the driver-guest problem have failed to meet the public's need for fair and expeditious settlement of accident claims. Inherent difficulties in defining a driver's duty, coupled with the evils of litigation against insurance companies, can be resolved by removing the issue of negligence entirely. All parties injured while passengers in an automobile would receive reasonable compensation, as opposed to the smaller number at present who are willing to navigate the rocky stream of ingratitude, collusion, substantial expense and delay, with the ultimate award being distorted by unbridled sympathy of the jury.

The proposal herein presented has many apparent advantages. By reducing the insurer's expenses for litigation and excessive awards, it is possible that compensation for all injured passengers would not entail the burden of higher rates for the public. This possibility, added to the prospect of greater fairness with less delay, argues strongly for adoption of the proposal.

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toward solving the problem of the uncompensated auto accident victim. Mr. Griffith's thoughts apparently have been borne out, as Nationwide's Family Compensation Endorsement, created as an experiment in 1957, is today a regular feature of their automobile policies. *Ibid.*